No. 16–1495

In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Fifth Amendment is violated when allegedly compelled statements are used at a probable cause hearing but not at a criminal trial.

PARTIES TO THE PROCEEDINGS

Petitioner, the City of Hays, Kansas, was a defendant–appellee in the court below.

Respondent Matthew Jack Dwight Vogt was the plaintiff–appellant in the court below.

The City of Haysville, Kansas, Don Scheibler, Jeff Whitfield, Kevin Sexton, and Brandon Wright are not parties in this Court but were defendants–appellees in the court below.

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INTRODUCTION

The Fifth Amendment to the United States Constitution provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; see *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964) (holding this Clause is incorporated against the States). Although this provision is commonly known as the Self–Incrimination Clause, this Court has explained that "[t]he term 'privilege against self–incrimination' is not an entirely accurate description of" what the Clause actually prohibits. *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000). The Fifth Amendment provides no protection against embarrassment, "personal disgrace or opprobrium." *Brown* v. *Walker*, 161 U.S. 591, 605 (1896), nor does it prohibit compulsion as such. At its heart, the Self–Incrimination Clause creates an evidentiary rule that bars the prosecution from forcing a criminal defendant to take the witness stand or from introducing the defendant's own previously compelled statements at trial. To ensure that rule is not violated, this Court has held that those at risk of future prosecution or penalties have a legally enforceable privilege against being compelled to make statements that could be used to incriminate them in such proceedings. But, at bottom, the Fifth Amendment is "a fundamental *trial* right of criminal defendants" that can be violated "only *at trial*." *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added). Because here the allegedly compelled statements were never used against respondent "at trial," he has stated no claim upon which relief can be granted and this Court should reverse.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–34a) is reported at 844 F.3d 1235. The district court's Memorandum and Order (Pet. App. 35a–44a) is unpublished but is available at 2015 WL 5730331.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2017. A petition for rehearing was denied on January 30, 2017 (Pet. App. 45a). On April 21, 2017, Justice Sotomayor extended the time to file a petition for a writ of certiorari to and including June 29, 2017. The petition for a writ of certiorari was filed on June 13, 2017, and granted on September 28, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person * * * shall be compelled in any criminal case to be a witness against himself."

STATEMENT

A. Factual background

Petitioner City of Hays (City) is a municipality in Kansas; respondent Matthew Vogt is one of its former police officers. Pet. App. 47a. In 2013, while still employed by the City, Vogt applied for a job with the police department of a different municipality. *Id.* at 48a. During an interview, Vogt revealed that, "while working as a * * * police officer" for the City, he had "com[e] into possession of" a knife, but, rather than reporting the knife, "he had kept [it] for his personal use." *Ibid.* The interviewing department extended a job offer, conditioned on Vogt telling the City (his then–current employer) about the knife and surrendering it. *Id.* at 48a–49a.

Vogt told the City's chief of police about the knife. Pet. App. 49a. The chief directed Vogt to provide additional information and opened an internal investigation. *Ibid.* In the language of his own complaint, Vogt then gave the chief a "vague one–sentence report related to his possession of the knife" and submitted his two weeks' notice of resignation. *Ibid.*[1] The lieutenant in charge of internal investigations directed Vogt to provide additional information. *Ibid.* Vogt made a further statement, which included "the type of police call [Vogt] was handling when he came into possession of the knife." *Id.* at 49a–50a. Using that information, the lieutenant was able to locate "an audio recording which captured the circumstances of how [Vogt] came into possession of the knife." *Id.* at 50a. At that point, the chief suspended the internal investigation and gave Vogt's statements and the resulting information to the Kansas Bureau of Investigation. *Ibid.* Because Vogt had become the subject of a criminal investigation, the other municipality withdrew its job offer. *Ibid.*

The State of Kansas (which is not a party to this case) later charged Vogt with two felony counts related to the knife. Pet. App. 50a. Under state law, Vogt was entitled to what his complaint refers to as a "probable cause hearing," *ibid.*, and what Kansas statutes call "a preliminary examination." Kan. Stat. Ann. § 22–2902(1) (2016). Vogt alleges that, at this hearing, his

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[1] According to Vogt, this statement and subsequent statements to his lieutenant were "compelled" because providing them was "a condition of his employment with the Hays police department." Pet. App. 49a; see *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (holding that "statements obtained under threat of removal from office" are compelled for purposes of the Self–Incrimination Clause).

statements about the knife and information from the subsequent investigation were "used against him." Pet. App. 50a.[2] After the hearing, a state trial court judge dismissed both charges for lack of probable cause. *Id.* at 50a–51a.

B. Procedural background

1. Following the dismissal of all criminal charges against him, Vogt sued the City, the other municipality with which he had sought employment, and four individual officers. Pet. App. 46a–54a. Vogt alleged that the defendants were liable under 42 U.S.C. § 1983 for violating his Fifth Amendment rights. *Id.* at 51a–53a. As relevant here, Vogt alleged that: (1) by threatening to terminate his employment if he did not provide additional statements about the knife, the defendants compelled him to make incriminating statements; and (2) his Fifth Amendment rights were violated when those statements were used at the probable cause hearing. *Id.* at 49a–50a.

All of the defendants (including the City) moved to dismiss Vogt's complaint for failure to state a claim. Pet. App. 35a. The district court granted that motion, reasoning that because "the compelled statements were never introduced against Vogt at trial," the complaint "fail[ed] to state a violation of his Fifth Amendment rights." *Id.* at 43a–44a.

2. The Tenth Circuit affirmed in part and reversed in part. Pet. App. 1a–34a. The court affirmed the dis-

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[2] The complaint does not specify the manner in which the statements or resulting information "were used against" Vogt or whether Vogt objected to that use. Pet. App. 50a. Vogt's complaint is reproduced, in its entirety, at Pet. App. 46a–54a.

missal of Vogt's claims against the four individual officers based on qualified immunity. *Id.* at 2a. The court also affirmed the dismissal of Vogt's claim against the other municipality because it had not compelled Vogt to incriminate himself. *Ibid.* Unlike the district court, however, the Tenth Circuit concluded that Vogt had stated a valid Fifth Amendment claim against the City, the municipality that had employed him. *Ibid.*

The key question in this case, the Tenth Circuit recognized, is whether using a compelled statement at a probable cause hearing violates the Self–Incrimination Clause. The court of appeals determined it does. The Tenth Circuit acknowledged that this Court has "suggested * * * that the right against self–incrimination is only a trial right." Pet. App. 5a (citing *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990)). Ultimately, however, the court of appeals concluded that: (1) "the right against self–incrimination is more than a trial right," *id.* at 10a; and (2) "[t]he Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing." *Id.* at 2a.

SUMMARY OF ARGUMENT

The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." To be clear: Our argument does not turn on when a "criminal case" begins. Instead, it involves a different question: What acts render someone "a witness against himself" within that criminal case?

Our position is simple: The Self–Incrimination Clause provides no protection against embarrassment, "personal disgrace or opprobrium." *Brown* v. *Walker*,

161 U.S. 591, 605 (1896), and compulsion alone does not violate it. Unless and until a criminal defendant is forced to take the witness stand or the defendant's own compelled statements are introduced against the defendant at trial, we submit, the defendant has not been made "to be a witness against himself," and no Fifth Amendment violation has occurred.

A. On multiple occasions, this Court and individual Justices have described the Self–Incrimination Clause as "a fundamental trial right of criminal defendants" that can be violated "only at trial." *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990). To be sure, none of these statements was a holding on the specific issue now before the Court. But nor can they be dismissed as casual dicta. Rather, in several instances, the fact that the Fifth Amendment protects a specifically trial–focused right was fundamental to the analysis of the questions then in dispute.

The privilege against self–incrimination may, of course, be claimed outside and long before the start of any criminal case. But that fact does not change the Fifth Amendment's basic character, because the question of when the privilege may be claimed is distinct from the question of when a Self–Incrimination Clause violation actually occurs. And, as this Court has explained, the ability to claim the privilege before trial serves two important functions: preventing end–runs around the principle that criminal defendants may not be compelled to be witnesses at their own trials and heading off any claim that earlier statements were voluntary, and thus admissible at those trials.

B. Firmly established doctrines confirm that the Fifth Amendment is a trial right. Most notably, the

privilege not to speak terminates once the threat of future criminal liability is removed, including via a grant of immunity. Nor can the court of appeals' view that "the Fifth Amendment precludes use of compelled statements in pretrial proceedings," Pet. App. 19a, be squared with the fact that a criminal defendant cannot attack a facially valid indictment by alleging that the grand jury considered the defendant's own previously compelled statements. It also would make little sense to apply different constitutional rules to pretrial proceedings (like the probable cause hearing at issue here) that are expressly designed to serve as substitutes for grand juries than to grand juries themselves. Last but not least, this Court's decisions confirm that other constitutional provisions that use the word "witness"—most notably, the Confrontation Clause of the Sixth Amendment—also protect trial rights.

C. This Court's "penalty cases" underscore that the Self–Incrimination Clause is a trial right. The Court has identified various contexts where the government may not condition public employment or other benefits on a person's waiver of the privilege against self–incrimination. In all but one of those cases, however, no statements were made, so the Court had no occasion to decide what restrictions the Fifth Amendment would have placed on their use. And in the one case where the subjects made statements (*Garrity* v. *New Jersey*, 335 U.S. 493 (1967)), the only constitutional violation identified by the Court was the use of those statements at the defendants' criminal trial. Finally, even if *some* types of Fifth Amendment violations could occur before trial, the Court should reject any such notion for *Garrity* claims. Instead, the Court should hold that, when a public employee speaks, no constitutional violation occurs unless and until the resulting statements

or their fruits are used against that employee at a subsequent criminal trial.

D. The court of appeals' contrary rule would hinder efforts to detect and root out misconduct by public officials. From the City's perspective, this matter began when one of its police officers volunteered information that suggested misconduct and required investigation. The court of appeals' holding— that Vogt has stated a claim against the City even though the allegedly compelled statements were never used against him at a criminal trial—would require States to further re–jigger already complicated pre–trial procedures, delay what are meant to be informal preliminary proceedings, and chill investigations into official misconduct.

E. Holding that the Self–Incrimination Clause can only be violated at trial would not require the Court to overlook or condone bad behavior because other constitutional provisions place substantial restrictions on abusive government conduct. This Court has already ruled that sufficiently serious interrogation–related misconduct violates the Due Process Clause, and that it does so regardless of whether a criminal case is even initiated. The Fourth, Eighth, and Fourteenth Amendments also provide protection against excessive or unwarranted force from the moment of initial contact with law enforcement through ultimate release from confinement.

ARGUMENT

This case presents a straightforward question of law: Is the Fifth Amendment violated when allegedly compelled statements are used at a probable cause hearing but never at a criminal trial? The answer is no.

To be clear at the outset: Our argument does not turn on when a "criminal case" begins. U.S. Const. amend. V. Rather, it involves what uses of allegedly compelled statements do—and what uses do not—render someone "a witness against himself" within that criminal case. Precedent, purpose, and policy all point to the same answer: A person has not been "compelled * * * to be a witness against himself," U.S. Const. amend. V, unless and until a criminal defendant is forced to take the witness stand or the defendant's own compelled statements are introduced against the defendant at a criminal trial.

A. This Court has repeatedly described the Fifth Amendment as a trial right

1. This Court and individual Justices have repeatedly described "[t]he privilege against self–incrimination guaranteed by the Fifth Amendment" as "a fundamental trial right" that can be violated "only at trial." *United States* v. *Verdugo–Urquidez*, 494 U.S. 259, 264 (1990).[3] None of these statements, of course, was a

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[3] Accord *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (stating that "*Miranda* safeguards a fundamental *trial* right") (internal quotation marks and citation omitted); *Kastigar* v. *United States*, 406 U.S. 441, 461 (1972) (stating that "[a] coerced confession * * * is inadmissible *in a criminal trial*") (emphasis added); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 57 n.6 (1964) (describing the Fifth Amendment as forbidding "the use *in a criminal trial* of self–incriminating statements elicited by compulsion") (emphasis added); see also *Jackson* v. *Denno*, 378 U.S. 368, 377

holding on the precise question now before the Court. But nor were they casual dicta. Instead, these descriptions of how the Fifth Amendment operates played an important role in the analysis of the issues then in dispute.

Take *Verdugo–Urquidez*, for example. The issue there involved the scope of the Fourth Amendment, specifically whether it "applie[d] to the search and seizure by United States agents of property * * * owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. The relevant discussion is in the first paragraph of the Court's legal analysis, which began by emphasizing the importance of distinguishing between the Fourth and Fifth Amendments. *Id.* at 264. "Although conduct by law enforcement officers prior to trial may ultimately impair that right," the Court explained, "[t]he privilege against self–incrimination * * * is a fundamental trial right" and "a constitutional violation occurs only at trial." *Ibid.* In contrast, "[t]he Fourth Amendment functions differently" by "prohibit[ing] 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial." *Ibid.* And because a Fourth Amendment violation "is fully accomplished at the time of an

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(1964) (referring to a defendant's due process–based "right to be free of a *conviction* based upon a coerced confession") (emphasis added); *Maryland* v. *Craig*, 497 U.S. 836, 865 (1990) (Scalia, J., dissenting) (arguing that the phrase "witnesses *against him*" in the Confrontation Clause "obviously refers to those who give testimony against the defendant at trial"); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964) (holding that the defendant "was denied the basic protections of" the Sixth Amendment "guarantee when *there was used against him at his trial* evidence of his own incriminating words," which were deliberately elicited after indictment and when counsel was not present) (emphasis added).

unreasonable government intrusion," the Court continued, any constitutional violation in *Verdugo–Urquidez* occurred "solely" in the place the search was performed (Mexico). *Ibid.* (internal quotation marks and citation omitted). The differing natures of the Fourth and Fifth Amendments was thus critical to the Court's analysis of the issue before it. Accord *United States* v. *Janis*, 428 U.S. 433, 443 (1976) (contrasting "the Fifth Amendment's direct command against the admission of compelled testimony" with the fact that, under the Fourth Amendment, "the issue of admissibility of evidence * * * is determined after, and apart from, the violation").

The difference between the Fourth and Fifth Amendments also was critical in *Withrow* v. *Williams*, 507 U.S. 680 (1993). In *Stone* v. *Powell*, 428 U.S. 465 (1976), this Court held that federal habeas review is generally unavailable to state prisoners who claim that a conviction rests on evidence obtained in violation of the Fourth Amendment. *Id.* at 494–495. The question in *Withrow* was whether that same rule applies to claims that a conviction stems from a violation of the Fifth Amendment rule recognized in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Court said no, and, once again, its explanation relied on the differences between the Fourth and Fifth Amendments. A criminal defendant, the Court explained, has no "'personal constitutional right'" to the exclusion of evidence obtained in violation of the Fourth Amendment because "the exclusion of evidence at trial can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation." *Withrow*, 507 U.S. at 691 (quoting *Stone*, 428 U.S. at 486). But the Fifth Amendment is different. "'Prophylactic' though it may be," the Court

explained, "in protecting a defendant's Fifth Amendment privilege against self–incrimination, *Miranda* safeguards 'a fundamental *trial* right.'" *Ibid.* (quoting *Verdugo–Urquidez*, 494 U.S. at 264). And on the very next page, the Court made clear what "fundamental *trial* right" it was talking about: "guard[ing] against 'the use of unreliable statements *at trial*.'" *Id.* at 692 (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966)) (emphasis added).

The same is true of Justice Marshall's analysis in *New York* v. *Quarles*, 467 U.S. 649 (1984). Dissenting from the Court's decision to recognize a "public–safety exception" to *Miranda*, Justice Marshall questioned the need for any such doctrine. "If a bomb is about to explode or the public is otherwise imminently imperiled," Justice Marshall explained, "the police are free to interrogate suspects without advising them of their constitutional rights. * * * If trickery is necessary to protect the public, then the police may trick a suspect into confessing." *Id.* at 686 (Marshall, J., dissenting). The reason Justice Marshall gave is simple and directly applicable to this case: "While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment * * * proscribes this sort of emergency questioning. *All the Fifth Amendment forbids is the introduction of coerced statements at trial.*" *Ibid.* (emphasis added). We agree.

2. This Court has long recognized that those subject to future prosecution have a legally enforceable privilege to refuse to make statements that may tend to incriminate them in that future prosecution. *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973) (explaining that the Fifth Amendment creates a "privilege[] * * * not to answer official questions * * * in any * * * proceeding,

civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"); see *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984) (similar). That is why people may "take the Fifth" in civil cases,[4] before congressional committees,[5] in juvenile proceedings,[6] inside a police interrogation room,[7] and before a grand jury.[8] And it is why, when they do so, "the interrogation must cease," *Miranda*, 384 U.S. at 474, and the person may not be jailed or otherwise compelled to testify.[9]

But the question is not whether these rules exist: the question is why. And the reason is not because compelling someone to speak in any of those situations—situations that often will occur long before it is clear whether there even will *be* a "criminal case[]" at all—would, in and of itself, violate the Fifth Amendment. Rather, "[t]he natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its

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[4] *Malloy* v. *Hogan*, 378 U.S. 1, 11 (1964); accord *McCarthy* v. *Arndstein*, 266 U.S. 34, 40–41 (1924) (bankruptcy proceedings).

[5] *Watkins* v. *United States*, 354 U.S. 178, 188, 195–197 (1957).

[6] *In re Gault*, 387 U.S. 1, 49–50, 55 (1967).

[7] *Miranda* v. *Arizona*, 384 U.S. 436, 444–445 (1966).

[8] *United States* v. *Washington*, 431 U.S. 181, 186 (1977); *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892), overruled in part by *Kastigar* v. *United States*, 406 U.S. 441 (1972).

[9] If a judge or other governmental actor improperly fails to respect the privilege not to incriminate oneself, that decision may be challenged by resisting any enforcement action on the ground that it was taken without lawful authority. Cf. *Hickman* v. *Taylor*, 329 U.S. 495, 500, 514 (1947) (affirming vacatur of contempt citation against attorney for refusing to turn over notes of interviews w..h witnesses after concluding that the discovery rules did not obligate the attorney to turn over the notes).

invocation useless at a later stage." *Michigan* v. *Tucker*, 417 U.S. 433, 440–441 (1974).

Allowing a prospective criminal defendant to claim a privilege against self–incrimination addresses this concern in two related but distinct ways. The first involves preventing end–runs. As this Court has explained, "a defendant's right not to be compelled to testify against himself *at his own trial* might be practically nullified if" the prosecution could simply introduce self–incriminating statements that the defendant had been forced to make beforehand. *Tucker*, 417 U.S at 441 (emphasis added).

The second reason involves avoiding later disputes about whether pretrial statements were actually compelled. In *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), for example, the Court held that a criminal defendant had forfeited any ability "to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution." *Id.* at 440. Because "Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege," the Court reasoned, "his disclosures were not compelled incriminations" and the Fifth Amendment posed no barrier to their admission at a subsequent trial. *Ibid.*; see also *Garner* v. *United States*, 424 U.S. 648, 665 (1976) (similar holding about statements on tax returns); *United States* v. *Kordel*, 397 U.S. 1, 7 (1970) (same with respect to answers to interrogatories during an earlier civil proceeding). Allowing an assertion of privilege during earlier proceedings is thus necessary to remove any claim that the party "forfeit[ed] the right to exclude the evidence in a subsequent 'criminal case.'" *Chavez* v. *Martinez*, 538 U.S. 760, 771 (2003) (opinion of Thomas, J.). In both senses, though, the reason for these rules is to ensure that any

resulting statements may not be used in the only setting where the Fifth Amendment can actually be violated: a criminal trial in which the declarant is the defendant.

B. Well–settled doctrines underscore that the Fifth Amendment is a trial right

Three other doctrinal features confirm that the Self–Incrimination Clause is a "trial right" (*Verdugo–Urquidez*, 494 U.S. at 264) rather than a freestanding entitlement against having compelled statements used in connection with judicial proceedings. The first is the well–settled principle that there is no right to remain silent when there is no risk of future criminal liability. The second is the fact that even those still facing liability may not attack a facially valid indictment on the theory that the grand jury considered the defendant's own compelled statements. The third is that two other constitutional provisions that use the word "witness"—the Confrontation and the Compulsory Process Clauses—also protect trial rights.

1. It is black–letter law that there is no privilege absent danger of future criminal liability. Most dramatically, because the Double Jeopardy Clause would bar another prosecution, a person who has been acquitted of a crime loses the privilege not to speak about it. (That is why, for example, O.J. Simpson could not claim any privilege against self–incrimination at the civil trial following his acquittal on murder charges. See Jeffrey Toobin, *The Run of His Life: The People v. O.J. Simpson* 427–428 (2015).) But the same is true regardless of why future criminal liability is off the table. Whether the statute of limitations has run, the underlying criminal statute has been repealed, or the person has been pardoned, the answer is the same.

The Self-Incrimination Clause provides no protection against embarrassment, "personal disgrace or opprobrium." *Brown* v. *Walker*, 161 U.S. 591, 605 (1896). "If no adverse consequences can be visited * * * by reason of further testimony, then there is no further incrimination to be feared" and no privilege to be invoked. *Mitchell* v. *United States*, 526 U.S. 314, 326 (1999).[10]

Indeed, the Fifth Amendment provides no absolute shield even to those still facing the prospect of criminal liability. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), for example, this Court affirmed an order requiring unwilling witnesses to testify before a grand jury. *Id.* at 442–443, 462. Because the witnesses had not received "transactional immunity"—that is, "immunity from prosecution for offenses to which compelled testimony relates"—they still could have been convicted and punished for the underlying conduct. *Id.* at 443. The Court nonetheless rejected the witness's claim of privilege. The witnesses had been granted "use and derivative-use immunity," *id.* at 458, pursuant to a statute providing that neither their testimony

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[10] In *Mitchell*, this Court held that a criminal defendant who pleads guilty but has not yet been sentenced may continue to assert a privilege against self-incrimination at the sentencing hearing. 526 U.S. at 321. Far from endorsing the view that *any* use of allegedly compelled statements in connection with a criminal case violates the Self-Incrimination Clause, *Mitchell* emphasized that a convicted but unsentenced defendant can still face direct "adverse consequences" from any statements until "the sentence has been fixed and the judgment of conviction has become final." *Id.* at 326; see *id.* at 325 ("reject[ing] the proposition that incrimination is complete once guilt has been adjudicated") (internal quotation marks and citation omitted). Our position is simply the converse: a person cannot be made to be a "[w]itness against himself" *until* a case reaches the stage where guilt and punishment are determined.

nor "any information directly or indirectly derived from such testimony * * * may be used against the witness in any criminal case." *Id.* at 460 (quoting 18 U.S.C. § 6002). Because this pledge "removed the dangers against which the privilege protects," *id.* at 449, and left "the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege," *id.* at 458–459 (quotation marks and citation omitted), the Court held that it was "constitutionally sufficient to compel testimony over a claim of the privilege." *Id.* at 458; accord *McKune* v. *Lile*, 536 U.S. 24, 35 (2002) (opinion of Kennedy, J.) (explaining that "[i]f the State of Kansas offered immunity, the self–incrimination privilege would not be implicated"); *Minnesota* v. *Murphy*, 465 U.S. at 435–436 n.7 (noting that a State may compel probationers to provide "answers to even incriminating questions * * * as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination").

To be sure, *Kastigar* contains language that could be read to say that the statutory grant of immunity would have direct application to various out–of–court activities as well. See, *e.g.*, 406 U.S. at 459 (referencing use of immunized testimony to "obtain leads, names of witnesses, or other information not otherwise available"). But these statements must be read in context. Even in *Kastigar* itself, the Court made clear that the fundamental purpose of immunity is "assuring that the compelled testimony can in no way lead to the infliction of criminal *penalties*"; that "[b]oth the [immunity] statute and the Fifth Amendment allow the government to *prosecute* using evidence from legitimate independent sources"; and that the proper forum for

resolving such disputes is "*at trial*." *Id.* at 461 (emphasis added); accord *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 57 n.6 (1964) (describing the Fifth Amendment as forbidding "the use *in a criminal trial* of self–incriminating statements elicited by compulsion") (emphasis added).[11]

What is more, the argument that a Fifth Amendment violation can occur absent *any* courtroom use of the resulting statements—whether based on *Kastigar* or language in earlier cases—is foreclosed by this Court's later decision in *Chavez* v. *Martinez*, 538 U.S. 760 (2003). In *Chavez*, the Ninth Circuit held that an officer's "coercive questioning" of the plaintiff, in and of itself, "violated his Fifth Amendment rights." *Id.* at 765 (opinion of Thomas, J.). This Court reversed. Although there was no opinion for the Court on the Fifth Amendment issue, even the dissenting Justices recognized that a majority had "conclude[d] that a violation of the Self–Incrimination Clause does not arise until a

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[11] The same is true of *United States* v. *Hubbell*, 530 U.S. 27 (2000), which affirmed the dismissal of an indictment against a defendant previously granted immunity in connection with a subpoena *duces tecum*. See *id.* at 30–32, 34. The bulk of the Court's analysis focused on the threshold question of whether, absent the grant of immunity, the act of producing the documents would have been covered by the Fifth Amendment. Having answered that question yes, see *id.* at 45, the Court turned to the question of remedy. Summarizing *Kastigar*, the Court stated that the indictment must be dismissed "unless the Government prove[d] that the evidence it used in obtaining the indictment *and proposed to use at trial* was derived from legitimate sources 'wholly independent' of the testimonial aspect of respondent's immunized conduct." *Ibid.* (emphasis added). Like *Kastigar*, then, *Hubbell* had no occasion to determine whether the Fifth Amendment is actually *violated* by uses short of trial.

privileged statement is introduced at some later criminal proceeding." *Id.* at 789 (Kennedy, J., concurring in part and dissenting in part); accord *id.* at 767 (opinion of Thomas, J.) ("Martinez was never made to be a 'witness' against himself * * * because his statements were never admitted as testimony against him in a criminal case"); *id.* at 777 (Souter, J., concurring in the judgment) (stating that the Self–Incrimination Clause "focuses on courtroom use of a criminal defendant's compelled, self–incriminating testimony" and that "the core of the guarantee against compelled self–incrimination is the exclusion of any such evidence"). Indeed—and directly relevant to this case—Justice Kennedy's dissenting opinion described the controlling opinions as "maintain[ing] that in all instances a violation of the Self–Incrimination Clause simply does not occur unless and until a statement is introduced *at trial*." *Id.* at 790 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

2. a. The Tenth Circuit's conclusion that "the Fifth Amendment precludes use of compelled statements in pretrial proceedings," Pet. App. 19a, has another serious problem as well: It cannot be squared with the rule that a criminal defendant may not attack a facially valid indictment by alleging that the grand jury considered his own previously compelled statements. See *United States* v. *Calandra*, 414 U.S. 338, 346 (1974) ("[A]n indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid."); accord *Lawn* v. *United States*, 355 U.S. 339, 349–350 (1958).

The grand jury is, of course, "a constitutional fixture in its own right," *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (quotation marks and citation omit-

ted). But the Fifth Amendment contains a "direct command against the admission of compelled testimony," *Janis*, 428 U.S. at 443, and neither the Fifth nor the Sixth Amendment carves out a grand jury–specific exception to that command. This Court's decisions, however, provide an answer that both explains the grand jury example and covers this case: "The privilege against self–incrimination * * * is a fundamental trial right" that can be violated "only at trial." *Verdugo–Urquidez*, 494 U.S. at 264. See p. 12–15, *supra* (explaining that witnesses who are potentially subject to criminal liability may invoke a right to remain silent before the grand jury itself).[12]

b. The grand jury comparison does not merely refute any suggestion that a Fifth Amendment violation can occur during any "pretrial proceedings." Br. in. Opp. 15. It also underscores why saying that a violation can occur at the specific type of hearing at issue in this case would make little sense.

The Grand Jury Clause is one of the few provisions of the Bill of Rights that is not incorporated against the States via the Fourteenth Amendment. See *Hurtado* v. *California*, 110 U.S. 516, 521 (1884); accord *Beck* v. *Washington*, 369 U.S. 541, 545 (1962) ("[T]here is no federal constitutional impediment to dispensing

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[12] Vogt's proposed analogies to other rules of constitutional criminal procedure, see Br. in Opp. 17–18, miss the mark. A defendant *may* attack a facially valid indictment by claiming that the prosecution violates the Double Jeopardy Clause. See, *e.g.*, *Hudson* v. *United States*, 522 U.S. 93, 99 (1997). And the reason a grand jury need not apply the Fourth Amendment exclusionary rule is because a violation of that Amendment "is fully accomplished by the original search" and the consideration of such evidence by a grand jury "work[s] no new Fourth Amendment wrong." *Calandra*, 414 U.S. at 354.

entirely with the grand jury in state prosecutions."). Instead, the Federal Constitution permits States to substitute prosecution by way of information, with no "judicial oversight or review of the decision to prosecute" or ability to challenge the information as not being supported by probable cause. *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975).

By providing Vogt with "a right to a preliminary examination before a magistrate" to determine whether "it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant," Kan. Stat. Ann. §§ 22–2902(1), (3) (2016), the State of Kansas has gone beyond what the Federal Constitution requires. See *Gerstein*, 420 U.S. at 119 (stating that "a judicial hearing is not [a] prerequisite to prosecution by information"). What is more, the State has created a procedure that is expressly designed to serve as an alternative to the very grand jury proceedings during which the Federal Constitution would pose no bar to consideration of any allegedly compelled statements. See Kan. Stat. Ann. § 22–2902(1) (2016) (providing that a right to a preliminary examination exists "*unless* such charge has been issued as a result of an indictment by a grand jury") (emphasis added). It would make little sense to say that the Fifth Amendment is violated under such circumstances.

3. Related constitutional provisions further underscore that the Fifth Amendment right not to be "compelled in any criminal case to be a witness against" oneself is a trial right. The Sixth Amendment contains two uses of the word "witness," providing that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against

him [and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

As with the Self–Incrimination Clause, this Court's decisions confirm that the Confrontation and Compulsory Process Clauses protect trial–specific rights. In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), this Court held that state court defendants who have not been indicted by a grand jury have a constitutional right to a probable cause hearing before they may be detained pending trial. *Id.* at 126. In so doing, however, the Court specifically rejected the argument that such hearings "must be accompanied by the full panoply of adversary safeguards—counsel, *confrontation*, cross-examination, and *compulsory process* for witnesses." *Id.* at 119 (emphasis added); see *id.* at 120 ("These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment."). So too in the grand jury context, where the Court has made clear that, notwithstanding the Confrontation and Compulsory Process Clauses, there is no right to confront the people who testify or to present one's own evidence. See *Williams*, 504 U.S. at 52 (stating that a target of a grand jury inquiry has no right "to tender his own defense"). The same word ("witness") in the Fifth Amendment should be construed likewise.[13]

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[13] The fact that the Self–Incrimination Clause is housed in the Fifth Amendment rather than the Sixth, see Pet. App. 17a–19a, provides no warrant for construing the word "witness" differently in those provisions. For one thing, as the court of appeals noted, see *id.* at 15a, James Madison's original draft of the Self–Incrimination Clause appears to have covered incrimination in both civil and criminal proceedings, which may explain why he avoided placing it in a provision (the Sixth Amendment) whose first words are: "In all criminal prosecutions * * *." It also is noteworthy that all of the rights protected by the Fifth Amendment,

C. This Court's "penalty cases" confirm that the Fifth Amendment is a trial right

Although there is only one Fifth Amendment, there are different kinds of self–incrimination claims. Vogt's claim arises under this Court's "penalty cases," specifically the rule of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). See Pet. App. 4a. These cases confirm that "[t]he privilege against self–incrimination," both in general and in the specific *Garrity* context, "is a fundamental trial right" that can be violated "only at trial." *Verdugo–Urquidez*, 494 U.S. at 264.

1. The Court has identified various contexts where the "government cannot penalize assertion of the constitutional privilege against compelled self–incrimination by imposing sanctions to compel testimony which has not been immunized." *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977). Those sanctions include state–mandated removal as an officer in a political party, *id.* at 802, 804; cancellation of public contracts, *Turley*, 414 U.S. at 71, 76; disbarment of an attorney, *Spevack* v. *Klein*, 385 U.S. 511, 512–513 (1967); and loss of public employment, *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 281–283 (1968); *Gardner* v. *Broderick*, 392 U.S. 273, 274–275, 279 (1968); *Garrity*, 385 U.S. at 500; see also *Slochower* v. *Board of Higher Ed.*, 350 U.S. 551 (1956) (similar holding under the Due Process Clause). "In any of these contexts," the Court has stated, "a witness

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including the Self–Incrimination Clause, are phrased in the negative, whereas all of the rights in the Sixth Amendment are phrased in the positive. Compare U.S. Const. amend. V ("No person shall * * *; nor shall any person * * *; nor shall be * * *, nor be * * *; nor shall * * *), with U.S. Const. amend. VI ("the accused shall enjoy the right to * * *").

protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Turley*, 414 U.S. at 78.

2. In all but one of the penalty cases, however, the prospective defendants made no statements. See *Cunningham*, 431 U.S. at 803; *Turley*, 414 U.S. at 76; *Uniformed Sanitation Men Ass'n*, 392 U.S. at 282–283; *Gardner*, 392 U.S. at 278–279; *Spevack*, 385 U.S. at 512–513 (opinion of Douglas, J.); *Slochower*, 350 U.S. at 552–553. The Court thus had no occasion in those cases to consider what actions would—and would not—have violated the required immunity had they spoken.

The exception is *Garrity* itself. Similar to this case, *Garrity* involved police officers and questions of job-related misconduct—there, "alleged fixing of traffic tickets." 385 U.S. at 494. "No immunity was granted" and the officers "answered the questions" put to them. *Id.* at 495. "Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws." *Ibid.* The officers "were convicted," *ibid.*, and this Court reversed.

Garrity's statement of its holding speaks of "use in subsequent criminal proceedings." 385 U.S. at 500; see *ibid.* ("We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office."). Viewed in isolation, this statement is ambiguous about whether it includes "uses" other than at trial. But language in opinions must be viewed in

the context of the case. See *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132–133 (1944) ("remind[ing] counsel that words of our opinions are to be read in the light of the facts of the case under discussion"). And in *Garrity* itself, the only prohibited "use" identified in the Court's opinion was use of the resulting statements "*[a]t the trial*." 385 U.S. at 495 n.2 (emphasis added); accord *id.* at 502 (Harlan, J., dissenting) (noting that portions of the petitioners' statements "were admitted at trial").

3. Even if some types of Fifth Amendment violations could occur before trial, the Court should reject any such notion in the *Garrity* context. Whether or not "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear," *Chavez*, 538 U.S. at 789 (Kennedy, J., concurring in part and dissenting in part), or "at the time and place police use severe compulsion to extract a statement from a suspect," *id.* at 799 (Ginsburg, J., concurring in part and dissenting in part), the same is emphatically not true when a public employer tells an employee that she may be discharged for refusing to cooperate with an official investigation. To the contrary, this Court has held that "[p]ublic employees *may* constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties" *so long as* "they have not been required to surrender their constitutional immunity." *Cunningham*, 431 U.S. at 806 (emphasis added). Because such determinations cannot be made unless and until there is a "subsequent criminal case in which [the public employee] is a defendant," *Turley*, 414 U.S. at 78, there can be no completed violation in the absence of a trial. Cf. *Chavez*, 538 U.S. at 789 (Kennedy, J., concurring) (agreeing "that failure to give a *Miranda* warning does

not, without more, establish a completed violation when the unwarned interrogation ensues").

D. A contrary rule would hinder efforts to detect and root out official misconduct

From the City's perspective, this matter began when one of its police officers presented his boss with a knife, stating that he had "com[e] into possession of [the knife] while working as a [City] police officer" and "had kept [it] for his personal use." Pet. App. 48a.[14] Governmental employers like the City have a vital and compelling interest in rooting out misconduct and discharging those who betray the public trust. Affirmance of the Tenth Circuit's ruling would frustrate those efforts by exposing municipalities to liability based on actions they can neither control nor predict. See *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (holding that municipalities, unlike individuals, are ineligible for a qualified immunity defense).

1. Given the procedural posture of this case—a motion to dismiss for failure to state a claim—we must assume that Vogt's statements were "compelled" within the meaning of the Fifth Amendment. But matters will rarely be so simple for government officials in the field or in the workplace. Was a person "in custody" or "interrogated" for *Miranda* purposes? Cf. *Oregon* v. *Elstad*, 470 U.S. 298, 316 (1985) (noting the "murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately

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[14] See Pet. App. 49a (stating that Vogt's job offer from the other police department "was conditioned upon [him] reporting the above information and tendering the knife" to the City); *ibid.* (stating that Vogt "complied with the condition of employment imposed by the [other] police department").

be held admissible"). Was a statement "voluntary" under a test that requires examination of "the totality of the circumstances," including education, prior criminal experience, the manner of interrogation, and the existence of threats or inducement? *Arizona* v. *Fulminante*, 499 U.S. 279, 286 & n.2 (1991). Would public employees have understood that "if they did not answer" potentially incriminating questions "they would be removed from office"? *Turley*, 414 U.S. at 80.

2. These questions often will not admit of easy answers. In fact, courts regularly hold suppression hearings to determine whether particular statements or evidence may be used at trial. See 3 Wayne R. LaFave et al., *Criminal Procedure* § 10.1(a) (4th ed. 2016) (stating that "the great majority of jurisdictions have abandoned the contemporaneous objection rule in favor of a requirement that objections be raised before trial by way of a pretrial motion to suppress"); cf. *Jackson* v. *Denno*, 378 U.S. 368, 395 (1964) (holding that the Constitution requires that "a proper determination of voluntariness be made prior to the admission of [a] confession to the jury which is adjudicating guilt or innocence"). At least in general, therefore, the only way an accused's own statements will be used at trial is if the defendant declines to challenge them or if the trial court specifically rules that the statements are admissible.

3. The same will not be true, however, before statements are used during pretrial proceedings. No decision of this Court requires any sort of hearing before a defendant's statements are used in that context. In federal prosecutions, for example, the deadline for ruling on a motion to suppress is "before trial" and can be even later if the court "finds good cause to defer a ruling." Fed. R. Crim. P. 12(d).

To be sure, the State from which this case arose (Kansas) permits a defendant to *file* a suppression motion before the type of hearing at issue here. See Kan. Stat. Ann. § 22–3215(1) (2016) ("Prior to the preliminary examination or trial a defendant may move to suppress as evidence any confession or admission given by him on the ground that it is not admissible as evidence."). Vogt has not claimed that he filed such a motion. Pet. App. 50a (complaint). And even had Vogt done so, it is far from clear whether any such motion would have been resolved before the allegedly compelled statements were used during the preliminary examination itself. Cf. Kan. Stat. Ann. § 22–3215(3) & (5) (2016) (providing that "the court shall conduct a hearing into the merits of the motion," but not providing any timeline for decision other than stating that "[t]he issue of the admissibility of the confession or admission shall not be submitted to the jury").

4. Affirmance of the decision below would create pressure to do at least one of three things. All but the third involve matters over which municipalities like the City have no direct control. And all three would have serious drawbacks as well.

The first option would be to create a procedural system where a judicial officer would resolve all possible Fifth Amendment issues before the defendant's statements are used during any sort of pretrial proceeding. Cf. Pet. App. 19a ("If the Fifth Amendment applies to pretrial proceedings, the evidence would be considered inadmissible in pretrial proceedings as well as at trial."). Municipal governments like the City obviously have no ability to create such a system on their own. At any rate, "[c]riminal justice is already overburdened by the volume of cases and the complexities of

our system," *Gerstein*, 420 U.S. at 122 n.23, and requiring courts to resolve potentially complicated suppression issues *before* conducting other pretrial proceedings could make it difficult for them to comply with other constitutional obligations. See *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55, 57 (1991) (permitting States to "incorporate" constitutionally mandated bail determinations "into other pretrial procedures," but holding that such "combined proceedings" must occur "no * * * later than 48 hours after arrest").

The second option would be to refrain during all pretrial proceedings from using any evidence that might conceivably later be held to be inadmissible at trial. Municipalities, of course, have no power to make those decisions, and the people who make them are protected by absolute immunity. See *Burns* v. *Reed*, 500 U.S. 478, 487–492 (1991) (prosecutors); *Stump* v. *Sparkman*, 435 U.S. 349, 356–357 (1978) (judges). More fundamentally, forcing courts to conduct pretrial proceedings without access to evidence whose admission they might ultimately find unproblematic at trial would unduly complicate what are supposed to be preliminary determinations about whether to hold such trials in the first place.

The third option would be for government officials (and the governments that employ them) to become even *more* cautious in investigating crime and other misconduct because of the added fear of Section 1983 liability arising from pretrial uses of any resulting statements. But "[v]oluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good," *Maryland* v. *Shatzer*, 559 U.S. 98, 108 (2010) (internal quotation marks and citations omitted), and "the Government, as an employer," has

an "essential" interest in "employee efficiency and discipline." *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part). Adding the prospect of personal (and municipal) liability to the mix every time a government official seeks information from an employee such as Officer Vogt would risk frustrating important "procedures for * * * imposing discipline for failures to act competently and lawfully." *Hudson* v. *Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment).

E. Other constitutional mechanisms exist for controlling abusive government conduct

Holding that the Self–Incrimination Clause can be violated only at trial will neither sanction nor incentivize abusive government conduct because other constitutional mechanisms exist to restrain it.

1. The prospect of exclusion of evidence at trial itself provides strong disincentive against governmental overreach. Indeed, lack of any "reason to believe that the law has been systemically defective in this respect" was one of the main reasons Justice Souter gave for declining to find "civil liability" in *Chavez*. 538 U.S. at 778–779 (Souter, J., concurring in the judgment); cf. *Quarles*, 467 U.S. at 669 (O'Connor, J., concurring in the judgment) (stating that "suppression * * * should by itself produce the optimal enforcement of the *Miranda* rule").

2. The Self–Incrimination Clause is not the only constitutional check on official misconduct that occurs in connection with an interrogation.

a. Despite the many differences of opinion in *Chavez*, the Court was nearly unanimous that barbaric or abusive forms of interrogation violate the Due

Process Clause, and that they do so whether or not any resulting statements are ever used in court. 538 U.S. at 773–776 (opinion of Thomas, J.); *id.* at 779 (Souter, J., concurring in the judgment); *id.* at 787–788 (Stevens, J., concurring in part and dissenting in part); *id.* at 795–799 (Kennedy, J., concurring in part and dissenting in part). Indeed, the Court specifically remanded for further proceedings on that basis, see *id.* at 779–780 (opinion of the Court by Souter, J.), and, on remand, the court of appeals held that the plaintiff had stated a claim under the Fourteenth Amendment's Due Process Clause. See *Martinez* v. *City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (per curiam).

b. The Fourth, Eighth, and Fourteenth Amendments provide additional protection as well. The constitutional prohibition against "unreasonable searches and seizures," U.S. Const. amend. IV, "provide[s] individuals with protection against the deliberate use of excessive physical force" from initial contact with law enforcement through at least the conclusion of an arrest. *Graham* v. *Connor*, 490 U.S. 386, 395 n.10 (1989). Pretrial detainees are protected "from the use of excessive force that amounts to punishment" by the Due Process Clause and may draw additional protection from the Fourth Amendment as well. *Ibid.*; accord *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2479 (2015) (Alito, J., dissenting) (noting that the Court has "not yet decided" "whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee"). And from conviction through release, prisoners are protected from the "excessive and unjustified" use of force by the Eighth Amendment's prohibition against "cruel and unusual punishments." U.S. Const. amend. VIII; *Whitley* v. *Alberts*, 475 U.S. 312, 327 (1986); see also *Hope*

v. *Pelzer*, 536 U.S. 730, 737 (2002) (stating that the Eighth Amendment bars "inflictions of pain * * * that are totally without penological justification" and reversing grant of summary judgment in favor of prison officials) (internal quotation marks and citation omitted).

c. Unlike the plaintiff in *Chavez*, Vogt has no free-standing Due Process claim; nor does he have a claim under any other constitutional provision. As a matter of procedure, Vogt's complaint specifically identifies "Fifth Amendment—Freedom from Self–Incrimination" as the sole basis for his claims. See Pet. App. 51a, 52a. As a matter of substance, Vogt has not and could not allege any governmental conduct "so brutal and so offensive to human dignity," *Rochin* v. *California*, 342 U.S. 165, 174 (1952), or so "arbitrary in the constitutional sense" as to "shock[] the conscience." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998) (quotation marks and citation omitted). Nor has Vogt argued that any physical force was ever used against him, much less force that was constitutionally "excessive."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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